

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0446P
Withholding Tax
For Tax Year 2003**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration- Information Return Penalty.

Authority: IC § 6-8.1-10-2.1, IC § 6-8.1-10-6; 45 IAC 15-11-2.

The taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer was assessed a penalty for the late filing of Forms W-2 for the year 2003. Taxpayer protested the penalty assessment.

The Department sent a letter to the taxpayer stating that the taxpayer could request a hearing by replying to the letter within twenty (20) days of the letter. The taxpayer did not reply to the Department's letter. Due to the taxpayer's failure to reply, this Letter of Findings is written based on the information in the taxpayer's protest file and other Department records relating to Taxpayer.

I. Tax Administration- Information Return Penalty.

DISCUSSION

The taxpayer protests the penalty for late filing of Forms W-2 for 2003. IC § 6-8.1-10-6 states:

(a) As used in this section, "information return" means the following when a statute or rule requires the following to be filed with the department:

(1) Schedule K-1 of form IT-20S, IT-41, or IT-65.

(2) Any form, statement, or schedule required to be filed with the department with respect to an amount from which tax is required to be deducted and withheld under IC 6 or from which tax would be required to be deducted and withheld but for an exemption under IC 6.

(3) Any form, statement, or schedule required to be filed with the Internal Revenue Service under 26 C.F.R. 301.6721-1(g) (1993).

The term does not include form IT-20FIT, IT-20S, IT-20SC, IT-41, or IT-65.

(b) If a person fails to file an information return required by the department, a penalty of ten dollars (\$10) for each failure to file a timely return, not to exceed twenty-five thousand dollars (\$25,000) in any one (1) calendar year, is imposed.

(c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.

The taxpayer utilizes an outside tax service which is responsible for the filing and payment of the Indiana withholding tax returns. The service provider is acting in an agency capacity for the taxpayer with full authority to file and pay these taxes. The actions of the agent acting on behalf of the taxpayer are viewed the same as if they were the actions of the taxpayer itself.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalties imposed under *that section* (i.e., IC § 6-8.1-10-2.1) upon a showing that the failure to pay the deficiency was based on “reasonable cause and not due to willful neglect.” However, the penalty imposed was assessed based on IC § 6-8.1-10-6, not IC § 6-8.1-10-2.1. As such, the penalty was mandatory and cannot be waived under the facts and circumstances of this case.

FINDING

The taxpayer’s protest is denied.

JR/BK/DK October 30, 2007